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Blowing the whistle on Sarbanes-Oxley: *Anonymous hotlines and the historical stigma of denunciation in modern Germany*

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Abstract

The US Sarbanes-Oxley Act requires publicly-held US companies and their EU-based affiliates, as well as non-US companies listed on one of the US stock markets, to adopt ethics codes of conduct and to establish procedures for dealing with confidential, anonymous submissions by employees regarding questionable accounting or auditing matters (whistleblowing schemes). Companies which fail to comply with these requirements are subject to heavy sanctions and penalties by Nasdaq, the New York Stock Exchange (NYSE) or the US Securities and Exchange Commission (SEC). However, such whistleblowing schemes are likely to involve the collection of personal data. EU subsidiaries of US companies or EU companies listed at one of the US stock exchanges and are therefore required to comply with the EU data protection rules enshrined in the EC Data Protection Directive (95/46/EC). Recent decisions of French and German courts that prevented companies from establishing anonymous whistleblowing procedures on the grounds that EU data protection law prevented the transfer of personal data without the data subject's consent, demonstrated a potential conflict regarding the compatibility of the EU and US regulatory systems. They not only created a dilemma for the companies concerned who are now facing risks of sanctions from EU data protection authorities if they fail to comply with EU data protection rules on the one hand, and from US authorities if they fail to comply with US rules on the other. The decisions also reflect the historical unease in many E.U. Member States over the concept of encouraging individuals to provide information about others anonymously and without an immediate opportunity for the accused person to respond. While, in Anglo-American societies whistleblowing hotlines are commonplace for many purposes such as the reporting of tax and social security fraud, the denunciation of a fellow citizen in countries like France and Germany comes with the underlying historical stigma attached to the interpretation of a whistleblower as an informer. In particular Germany, with its dual experience of "self-policing" in the Third Reich and the German Democratic Republic, and its ensuing constitutional framework of civil and human rights will find it difficult to adjust to a notion of denunciation as a "public-spirited" act. This paper will examine the data protection implications of the Sarbanes-Oxley Act and the way in which the moral and legal sensibilities which result from its terrible experiences inform the way in which whistleblowing schemes are viewed and implemented in Germany.